Statement Regarding HB 5785 – September 11, 2014
For House Committee on Judiciary
Submitted by Bruce A. Timmons

HB 5785 was introduced to "correct" or overcome the result of the Michigan Supreme Court decision of People v Cunningham in June, which was premised primarily on statutory interpretation of MCL 769.1k. One of the Court's contentions is that statutes are logical and consistent. Anyone familiar with the legislative process knows that many factors play into the final language of bills – and logic and consistency, regrettably perhaps, are not necessarily the beginning point nor end result of the process.

It is indeed curious that the Court got trapped by its own box of assumptions when the real answer may be outside that box. Note that **MCL 769.3** (conditional sentences) and **MCL 769.5** (alternative sentences) are fairly old statutes - MCL 769.5 going back at least to the original **1927** PA 175 and perhaps back into the 19th Century – both authorize "costs". [The reference in 769.3 to costs of prosecution at least dates back to 1982, maybe earlier.] By what logic would one assume that very old statutes on conditional and alternative sentences allow costs but regular sentences do not? Why would the Legislature specifically allow costs in 769.3 and 759.5 except to avoid the argument later that the absence of a reference to costs meant the Legislature intended to exclude what regular felony sentences provide?

One should compare the operative district court sections on "fines **and costs**" per MCL 600.8379 and 600.8381. These go back to the original statue creating the district court, **1968** PA 154. Read the original Sec. 8381 and see how it morphed from "judgment fee" to "minimum costs" per 1970 PA 248. **Every case!** That assumes that district court from Day 1 (1/1/11969) could impose "costs" in misdemeanor and ordinance cases, out of which a portion came to the state. This is important legislative history as to the imposition of costs in criminal cases in district court for 45 years. [See MCL 774.22 with respect to an old JP provision on costs that still applies to municipal courts.]

If one were to research sentences in felony cases fifty or more years ago, one might find that circuit judges have been imposing fines and costs for a very long time. Has anyone gone back in time to see whether that was the case or not?

Regardless, if the Court has not been asked to reconsider Cunningham, it is incumbent upon the Legislature to settle the confusion and consternation which that case caused and to authorize – if not re-authorize – sentencing judges to impose "(court) costs" in criminal (felony and misdemeanor) cases.

I have no opinion with regard to the attempt to define "costs" on page 2, subparagraph (iii), except to note that this paragraph compounds confusion evident in the Supreme Court's opinion in Cunningham that confuses "costs" with other monetary sanctions – sanctions which the MSC lumped together as though they are all one term ("costs"):

A. "Court costs" – related to the cost of operating the court. [Tend to go to court funding unit, in whole or in part.]

B. "Reimbursement" for specific expenses incurred by governmental units like county, city, township, or state. Not court-related and not because that unit of government funds the court.

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C. "Costs of prosecution", which suggest expenses associated with law enforcement and prosecution of the case, most typically the county, esp. felonies – not necessarily the court. [Distinguishing "costs" and "costs of prosecution" was actually one of the questions that MSC asked parties to brief, then dismissed because of its interpretation of 769.1k as now authorizing "costs".]

D. "Restitution", to restore a victim suffering personal injury or loss or damage to property.

E. "State minimum costs" paid to the State as a subset of "costs" imposed by a court – which assumed for years that courts could impose costs in every case. [Dates to 1970 in district court, as noted above.]

F. "Supervision fees", usually to pay for supervision of probation (or parole) that get paid to the state (Michigan Department of Corrections).

G. Specific identified expenses incurred by government, like expense of extradition or indigent defense. [These are more in the nature of reimbursement.]

"Cost(s) of prosecution" is not resolved by HB 5785. It is left hanging and should be resolved or the same conundrum will continue with that phrase. PAAM may have been its own worst enemy on this. They started including 'costs of prosecution' in bills – the phrase appears in some 60 statutes – so now courts are drawing an inference that in its absence the trial court is limited in what "costs" it can impose in felony cases generally. Compare footnote 9 with current MCL 257.625(13) (OUIL):

"(13) In addition to imposing the sanctions prescribed under this section, the court may order the person to pay the costs of the prosecution under the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69." [Q: How long has that phrase been there? At least since 1996.] That reference now leads to nowhere.

Amending MCL 769.1k may not be the best solution. An alternative would be to authorize "court costs" and "costs of prosecution" in a separate or new section (within Chap IX) and leave MCL 769.1k more in line with MSC's interpretation that it essentially lists the kinds of monetary sanctions that the court is imposing – not the terms and conditions of each. HB 5785 is sort of bipolar – a list of sanctions (in the MSC view) and a partial, incomplete and hence inconsistent, authorization of sanctions. That is mixing apples and meats. (The reference to minimum state costs was quite deliberate, in part because the money goes to a different destination – the state.)

Finally, in criminal cases the only "assessment" that ought to be allowed and recognized is the crime victim rights assessment authorized by Const 1963,Art. I, Sec. 24. There was a conscious effort to eliminate other "assessments" a decade ago and what is sometimes sought to be recouped better fits the categories listed above.

Respectfully,

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